Ong Kim Chuan & Anor v Lembaga Kumpulan Wang Simpanan Pekerja

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-04–125 OF 2006
HELILIAH, MOHD HISHAMUDDIN AND RAMLY ALI JJCA
22 JUNE 2009

Companies and Corporations — Directors — Personal liability — EPF contribution — Whether directors personally liable when company failed to pay EPF contributions — Whether winding up of company absolved directors from liability under s 46 of the Employees Provident Fund Act 1991

Companies and Corporations — Winding up — Fraudulent preference — Claim for payment due under Provident Fund — Whether winding up of company absolved directors from liability under s 46 of the Employees Provident Fund Act 1991 — Whether claim against directors and not against company — Whether fraudulent preference

Labour Law — Provident fund — Failure to contribute — Whether director personally liable when company failed to pay EPF contributions — Whether directors and former directors to jointly and severally liable for contribution due Employees Provident Fund Act 1991 s 46

The first defendant, Haleywood Industries Sdn Bhd, had failed to pay EPF contributions in respect of its employees for the periods of June 2000 to March 2002 and October 2000 to May 2002 ('the relevant periods'). The second and third defendants ('the appellants') were the directors of the first defendant. The first defendant was wound up on 18 November 2002. As such, the plaintiff claimed the EPF contributions against the appellants under s 46 of the Employees Provident Fund Act 1991 ('EPF Act') and obtained summary judgment against them at the sessions court. The appellants' appeal to the High Court against the said decision was dismissed and hence the present appeal. The appellants contended, inter alia,: (1) that under s 292(1) of the Companies Act 1965 ('Act'), in winding up of a company, any payment due under the Provident Fund can be realised by filing the proof of debt with the official receiver; (2) that s 46 applies only in respect of a company which is still in operation; (3) that s 46 must be read conjunctively with the provisions of the Act and that the directors cannot be held personally liable

in respect of the debts of the company; and (4) that the plaintiff's claim tantamount to fraudulent preference under the Act and thus unenforceable in law.

Held, dismissing the appeal with costs:

(1) Under s 46, it is clear that the directors of a company (including former directors who were directors during such periods in which contributions were liable to be paid) shall, together with the company, be jointly and severally liable for the contributions due. These provisions are enforceable notwithstanding anything to the contrary in any other written law. Being jointly and severally liable the said directors are liable either jointly together with the company or severally on their own independently of the company (see paras 18–19).

(2) The first defendant was only wound up on 18 November 2002, and the appellants' directorship in the company ceased long after the relevant periods. On that premise, the fact that the first defendant had been wound up on 18 November 2002 did not in any way absolve the appellants from the liability imposed by s 46 (see para 20).

(3) Since the plaintiff's claim against the appellants were on their personal liabilities under s 46, not a claim against the first defendant company, the issue of fraudulent preference under the Act did not arise at all (see para 23).

[Bahasa Malaysia summary

Defendan pertama, Haleywood Industries Sdn Bhd, telah gagal membayar caruman KWSP kepada pekerja-pekerjanya untuk tempoh Jun 2000 sehingga Mac 2002 dan Oktober 2000 sehingga Mei 2002 ('tempoh relevan'). Defendan kedua dan ketiga ('perayu-perayu') merupakan pengarah-pengarah defendan pertama. Defendan pertama telah digulungkan pada 18 November 2002. Oleh itu, plaintif menuntut caruman KWSP terhadap perayu-perayu di bawah s 46 Akta Kumpulan Wang Simpanan Pekerja 1991 ('Akta KWSP') dan mendapatkan penghakiman terus terhadap mereka di mahkamah sesyen. Perayu-perayu merayu ke Mahkamah Tinggi terhadap keputusan tersebut dan oleh itu rayuan ini dibuat. Perayu-perayu menegaskan, antara lain, (1) bahawa di bawah s 292(1) Akta Syarikat 1965 ('Akta'), dalam penggulungan sesebuah syarikat, apa-apa bayaran yang belum dilangsaikan di bawah Wang Simpanan boleh didapati dengan memfailkan bukti hutang dengan pegawai penerima; (2) bahawa s 46 hanya beraplikasi berkaitan dengan syarikat yang masih beroperasi; (3) bahawa s 46 perlu dibaca secara berhubung dengan peruntukan-peruntukan Akta dan bahawa pengarah-pengarah tidak boleh bertanggungan secara peribadi terhadap

A hutang-hutang syarikat; dan (4) bahawa tuntutan plaintif merupakan pemberian keutamaan secara fraud di bawah Akta dan oleh itu tidak boleh dilaksanakan dalam undang-undang.

B **Diputuskan**, menolak rayuan dengan kos:

(1) Di bawah s 46, adalah jelas bahawa pengarah-pengarah syarikat (termasuk pengarah-pengarah terdahulu yang merupakan pengarah sewaktu tempoh caruman tersebut bertanggungan untuk dibayar) C mesti, bersama-sama dengan syarikat, bertanggungan secara bersama dan berasingan untuk caruman-caruman yang belum dilangsaikan. Peruntukan-peruntukan ini boleh dilaksanakan meskipun terdapat sesuatu yang bercanggah dalam undang-undang bertulis yang lain. Pengarah-pengarah tersebut yang bertanggungan secara bersama dan D berasingan adalah bertanggungan sama ada secara bersama dengan syarikat atau secara berasingan secara bebas daripada syarikat (lihat perenggan 18–19).

(2) Defendan pertama hanya digulungkan pada 18 November 2002, dan E tempoh jawatan pengarah perayu-perayu dalam syarikat berakhir selepas tempoh relevan tersebut. Berdasarkan premis tersebut, fakta bahawa defendan pertama telah digulungkan pada 18 November 2002 dalam apa jua cara tidak membebaskan perayu-perayu daripada liabiliti yang dikenakan oleh s 46 (lihat perenggan 20).

F (3) Memandangkan tuntutan plaintif terhadap perayu-perayu adalah terhadap liabiliti peribadi mereka di bawah s 46, bukannya tuntutan terhadap syarikat defendan pertama, isu mengenai pemberian keutamaan secara fraud di bawah Akta tidak seharusnya timbul sama sekali (lihat perenggan 23).]

G **Notes**

For cases on failure to contribute, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1606–1607.

For cases on fraudulent preference, see 3(1) *Mallal's Digest* (4th Ed, 2006 H Reissue) paras 1070–1080.

For cases on personal liability, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 312–317.

Cases referred to

I *Salomon v Salomon & Co Ltd* [1897] AC 22, HL (refd)

Legislation referred to

Companies Act 1965 ss 218, 292(1)
Employees Provident Fund Act 1991 ss 2, 46, 65(1)

Subordinate Courts Rules 1980 O 26A

Appeal from: Civil Appeal No MT1–12–1 of 2004 (High Court, Johor Bahru)

Balasekaran (Bala & Co) for the appellants.
Dennis Yan Heen Khiong (Mohd Azizi Iskandar with him) (Ishak Sharif & Co) for the respondent.

Ramly Ali JCA (delivering judgment of the court):

[1] This is an appeal by the appellants (the second and the third defendants in the original case) against the decision of the learned High Court judge in dismissing the appellants' appeal against the decision of the sessions court allowing the plaintiff's claim for summary judgment under O 26A of the Subordinate Courts Rules 1980.

FACTUAL BACKGROUND

[2] The first defendant, Haleywood Industries Sdn Bhd, was at all material times an employer as defined under s 2 of the Employees Provident Fund Act 1991 ('the EPF Act').

[3] The first defendant had failed to make payment of EPF contributions in respect of its employees for the periods of June 2000 up to March 2002 and October 2000 up to May 2002 for a total sum of RM180,624.

[4] Both the second and third defendants (the appellants) were at all material times (during the relevant periods stated above) the registered directors of the first defendants.

[5] The first defendant was wound up on 18 November 2002.

[6] All the above facts are not in dispute.

[7] The plaintiff claimed for the said sum of RM180,624 initially from all the three defendants. However, since the first defendant was wound up on 18 November 2002, the plaintiff indicated (in its affidavit in reply — para 3) its intention to withdraw its claim against the first defendant.

[8] The plaintiff proceeded its claim for the said amount against the second and third defendants (the appellants), under s 46 of the EPF Act. The

A plaintiff obtained a summary judgment against the second and third defendants at the sessions court. The appellants' appeal to the High Court against the said decision was dismissed. Hence, the present appeal to this court.

B **[9]** In the present appeal, the appellants argued that they were not personally liable for the debt of the first defendant company under s 46 of the Employee Provident Fund Act 1991 because the appellants who were directors have lost their status or locus as directors when the first defendant company was been wound up under s 218 of the Companies Act 1965 and the official receiver has taken over the affairs of the first defendant company.

[10] Further it was also contended by the appellants that under s 292(1) of the Companies Act 1965 in winding up of a company, any payment due under the Provident Fund or Employees Superannuation can be realised by filing the proof of debt with the official receiver.

[11] The appellants contended that s 46 of the Act is not comprehensive to cover a situation where the company has been liquidated or wound up, and that the position of the directors' liability in such an event is not expressly provided for.

[12] The appellants also argued that the provision of s 46 of the Employee Provident Fund Act 1991 applies only in respect of the company which is still in operation and the directors have not lost their status or locus as directors.

[13] The appellants also submitted that s 46 of the EPF Act must be read conjunctively with the provisions of the Companies Act 1965 and that the directors cannot be held personally liable at law in respect of the debt of the company. To support this contention, the appellants relied on the strength of *Salomon v Salomon & Co Ltd* [1897] AC 22 — a judgment of the House of Lords which held that 'the incorporation of the company created a separate person ... and the members were not liable in respect of the company's obligations'.

[14] Finally, the appellants stressed that the plaintiff's claim under s 46 of the EPF Act for the said amount against the appellants tantamount to fraudulent preference under the Companies Act 1965 and thus unenforceable in law.

FINDINGS OF COURT

[15] It is not in dispute that the first defendant, Haleywood Industries, was

at all material times and employer as defined under s 2 of the EPF Act. It is also not in dispute that the first defendant had failed to pay contributions to the EPF for the said amount during the relevant periods; and during that periods, both the appellants were directors of the first defendant.

[16] Under s 65(1) of the EPF Act, all contributions recoverable by the EPF can be recovered summarily as civil debt.

[17] The plaintiff's action against both the appellants is based on the provisions of s 46 of the EPF Act which provides:

> Where any contributions remaining unpaid by a company, a firm or an association or persons, then, notwithstanding anything to the contrary in this Act or any other written law, the directors of such company including any persons who were directors of such company during such a period in which contributions were liable to be paid, or the partners of such firm, including any partners who were partners of such firm during such a period in which contributions were liable to be paid, or the office-bearers of such association of during such period in which contributions were liable to be paid, as the case may be, shall together with the company, firm or association of persons liable to pay the said contributions, be jointly and severally liable for the contributions due and payable to the fund.

[18] Under s 46, it is crystal clear that directors of a company (including persons or former directors who were directors during such periods in which contributions were liable to be paid to the EPF) shall together with the company be jointly and severally liable for the contributions due and payable to the fund. These provisions are to be enforceable 'notwithstanding anything to the contrary in any other written law'.

[19] Being 'jointly and severally liable' the said directors are liable either jointly together with the company or severally on their own independently of the company. In the present case, the plaintiff may choose to initiate its claim against the company (the first defendant) jointly with the two appellants (which was done initially) or to sue the appellants alone without the company (which was done later when the plaintiff withdrew its claim against the first defendant after the first defendant was wound up). The liability of the appellants (as directors at the relevant times) is based on the provisions of s 46 of the EPF Act above, not on common law or any other written law, not even the Companies Act 1965. Section 46 stands by itself 'notwithstanding anything to the contrary in the EPF Act or any other written law'.

[20] The liability on the appellants is created by statute ie s 46 of the EPF Act. The relevant period for such liability to exist is 'during such period in which contributions were liable to be paid' which in the present case is between June 2000 until March 2002; and October 2000 until May 2002.

During these periods, the first defendant company was still in operation and both the appellants were the directors. The first defendant company was only wound up on 18 November 2002, and the appellants directorship in the company ceased long after the relevant periods during which the said contributions were liable to be paid. On that premise, the fact that the first defendant company had been wound up on 18 November 2002 does not in any way absolve the appellants from the liability imposed by s 46.

[21] The liability under s 46 on the appellants is created by statute 'directly' and personally on the appellants as directors or former directors of the first defendant company. Thus the contributions due and payable become the debt of the appellants personally, jointly and severally with the company. Therefore, the appellants' argument that they were 'not personally liable for the debt of the company' cannot be hold water.

[22] The plaintiff had decided not to proceed with its claim against the first defendant company. Instead the plaintiff proceeded against the appellants as allowed under s 46 of the EPF Act. The plaintiff has the right and choice to do so. There is nothing unlawful about that. That being the case, the issue of the plaintiff's filing the proof of debt with the official receiver after the first defendant company has been wound up, as suggested by the appellants, does not arise. The appellants reliance on the case of *Salomon v Salomon & Co* also does not help them in any way.

[23] Since the plaintiff's claim against both the appellants are on their personal liabilities under s 46 of the EPF Act, not a claim against the first defendant, then the issue of 'fraudulent preference under the Companies Act 1965' as alleged by the appellants does not arise at all.

CONCLUSION

[24] Based on the above considerations, the court finds that the appellants' arguments to support their appeals are totally baseless and without merit. Therefore the court unanimously holds that the appeal is dismissed with costs of RM3000 to be paid by the appellants to the plaintiff (respondent) here and the court below. Deposit to the account of the costs.

Appeal dismissed with costs.

Reported by Kanesh Sundrum